

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION**

TEAM WORLDWIDE CORPORATION,

Plaintiff,

v.

ACADEMY, LTD d/b/a ACADEMY
SPORTS + OUTDOORS,

Defendant.

Case No. 2:19-cv-92-JRG-RSP

LEAD CASE

ACE HARDWARE CORPORATION,

AMAZON.COM, INC, AMAZON.COM LLC,

BED BATH & BEYOND INC.,

COSTCO WHOLESALE CORPORATION,

DICK'S SPORTING GOODS, INC.,

THE HOME DEPOT, INC.,

MACY'S, INC., MACY'S.COM, LLC,

TARGET CORPORATION, and TARGET
BRANDS, INC.,

SEARS, ROEBUCK AND CO., SEARS
HOLDINGS CORPORATION, and
TRANSFORM HOLDCO LLC,

Defendants.

Case No. 2:19-cv-00093-JRG-RSP

Case No. 2:19-cv-00094-JRG-RSP

Case No. 2:19-cv-00095-JRG-RSP

Case No. 2:19-cv-00096-JRG-RSP

Case No. 2:19-cv-00097-JRG-RSP

Case No. 2:19-cv-00098-JRG-RSP

Case No. 2:19-cv-00099-JRG-RSP

Case No. 2:19-cv-00100-JRG-RSP

Case No. 2:20-cv-00006-JRG-RSP

CONSOLIDATED CASES

**CONSOLIDATED DEFENDANTS' REPLY IN SUPPORT OF DEFENDANTS'
MOTION FOR SUMMARY JUDGMENT ON MARKING**

[REDACTED]

TWW's response omits the determinative issue for Defendants' motion for summary judgment on marking: that TWW has failed to provide evidence that the [REDACTED] [REDACTED]. By focusing on its own products and failing to identify any evidence as to [REDACTED], TWW's response confirms that there is no dispute that TWW did not mark, or cause to be marked, substantially all of [REDACTED].

Defendants' Motion clearly sets out: (1) [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] and, therefore, TWW's forfeiture of any pre-suit damages (*id.*, 6-10). In the face of this, TWW fails to present any evidence to support that [REDACTED] [REDACTED] or that TWW made any effort to ensure that they were marked. (Dkt. 242.) These undisputed facts and TWW's failure to rebut them are dispositive.

First, TWW baldly asserts that it disputes Defendants' calculation of [REDACTED] [REDACTED] is disputed but provides no counter evidence to support the alleged dispute. (Dkt. 242, 2-3.) TWW's assertion of a dispute, without more, is not sufficient to raise a genuine dispute, *Blue Spike, LLC v. Audible Magic Corp.*, 2016 WL 3653516, at *4 (E.D. Tex. May 31, 2016). Moreover, TWW cannot now present new data, [REDACTED] [REDACTED]. (See Dkt. 222, Exs. 1 & 19.)

Second, TWW argues that "Defendants present no evidence . . . that supports their allegation" that [REDACTED] were not marked. (Dkt. 242 at 6.) This argument is fatally flawed. Initially, TWW's argument is contrary to law. Instead, because, "[TWW] bears the burden of proof at trial, [Defendants] may merely point to an *absence of evidence*, thus shifting to

[TWW] the burden of demonstrating by competent summary judgment proof that there is an issue of material fact warranting trial.” *Lindsey v. Sears Roebuck & Co.*, 16 F.3d 616, 618 (5th Cir. 1994) (emphasis added). Here, Defendants have “point[ed] to portions of the record evidence that demonstrate[d]” that there is *no evidence* that [REDACTED] [REDACTED]—were marked. *Mass. Inst. of Tech.*, 2004 U.S. DIST. LEXIS 30052, *117 (E.D. Tex. Aug. 4, 2004). (See Dkt. 222 at ¶¶ 7-10.)

It is also undisputed that [REDACTED] [REDACTED]¹ (Dkt. 222, Ex. 4.) Thus, Defendants did identify factual support for this significant lack of marking, and the same evidence undercuts TWW’s reliance on *Mass. Inst.*, in which there was a contractual duty to mark. *Mass Inst.*, 2004 U.S. DIST. LEXIS 30052, *115. Moreover, *Mass. Inst.* distinguished itself from a scenario where a licensee was selling “commercial quantities” of licensed products under a license with no marking obligation. *Id.* at *128-29. This is exactly the situation here: [REDACTED]

[REDACTED]²

Because TWW “bears the burden of proving compliance,” *Nike, Inc. v. Wal-Mart Stores, Inc.*, 138 F.3d 1437, 1446 (Fed. Cir. 1998), and because TWW failed to satisfy its burden to prove that it marked, or caused to be marked, “substantially all of [REDACTED] in a “substantially consistent and continuous” manner, this Court should grant Defendants’ motion for summary judgment. *Am. Med. Sys., Inc. v. Med. Eng’g Corp.*, 6 F.3d 1523, 1537-38 (Fed. Cir. 1993).

¹ [REDACTED]

² Although TWW disputes Defendants’ pro-rata calculations of the sales of [REDACTED] TWW offers no evidence or argument as to what it believes is the correct amount [REDACTED]. (Dkt. 242 at 2-3.) Moreover, [REDACTED] (Dkt. 222, Ex. 1 at 49-51.)

Dated: February 5, 2021

Respectfully submitted,

/s/ Lauren M.W. Steinhäuser

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was filed electronically, under seal, in compliance with Local Rule CV-5(a)(7). A complete and unredacted copy of this document was served on counsel of record, all of whom have consented to electronic service, via email on February 5, 2021.

/s/ Lauren M.W. Steinhäuser

Lauren M.W. Steinhäuser

CERTIFICATE OF AUTHORIZATION TO FILE UNDER SEAL

The undersigned hereby certifies that the foregoing Consolidated Defendants' Reply in Support of Defendants' Motion for Summary Judgment on Marking is filed under seal pursuant to the Protective Order (Dkt. 94).

/s/ Lauren M.W. Steinhäuser
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